

SHIGE TAKIGUCHI, FUMI NONAKA,) 2:13-cv-01183-JAD-VCF
MITSUAKI TAKITA, KAORUKO KOIZUMI,)
TATSURO SAKAI, SHIZUKO ISHIMORI,)
YOKO HATANO, YUKO NAKAMURA,) ORDER
HIDEHITO MIURA, YOSHIKO TAZAKI,)
MASAAKI MORIYA, HATSUNE HATANO,)
SATORU MORIYA, HIDENAO TAKAMA,)
SHIGERU KURISU, SAKA ONO,)
KAZUHIRO MATSUMOTO, KAYA)
HATANAKA, HIROKA YAMAJIRI,)
KIYOHARU YAMAMOTO, JUNKO)
YAMAMOTO, KOICHI INOUE, AKIKO)
NARUSE, TOSHIMASA NOMURA, and)
RITSU YURIKUSA, Individually and)
on Behalf of All Others Similarly)
Situated,)
)
Plaintiffs,)
)
vs.)
)
MRI INTERNATIONAL, INC., EDWIN J)
FUJINAGA, JUNZO SUZUKI, PAUL)
MUSASHI SUZUKI, LVT, INC., dba)
STERLING ESCROW, and DOES 1-500,)
)
Defendants.)

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1 Inc. (hereinafter "Sterling Escrow") (#239). Plaintiffs have
2 opposed (#238), and the Suzukis have replied (#243).

3 The Suzukis argue that plaintiffs' fraudulent transfer claim
4 should be dismissed (1) under Federal Rule of Civil Procedure
5 12(b)(6) because some or all of it is barred under the applicable
6 statute of limitations/statute of repose, and (2) under Federal
7 Rule of Civil Procedure 9(b) as insufficiently pled.

8 In considering a motion to dismiss under Rule 12(b)(6), the
9 court must accept as true all material allegations in the complaint
10 as well as all reasonable inferences that may be drawn from such
11 allegations. *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1150 n.2 (9th Cir.
12 2000). The allegations of the complaint also must be construed in
13 the light most favorable to the nonmoving party. *Shwarz v. United*
14 *States*, 234 F.3d 428, 435 (9th Cir. 2000). However, legal
15 conclusions are not entitled to the presumption of truth. *Ashcroft*
16 *v. Iqbal*, 556 U.S. 662, 679 (2009).

17 "Under the notice pleading standard of the Federal Rules,
18 plaintiffs are only required to give a 'short and plain statement'
19 of their claims in the complaint." *Paulsen v. CNF, Inc.*, 559 F.3d
20 1061, 1071 (9th Cir. 2009) (quoting *Diaz v. Int'l Longshore &*
21 *Warehouse Union, Local 13*, 474 F.3d 1202, 1205 (9th Cir. 2007)).
22 While this rule "does not require 'detailed factual allegations,'"
23 it "must contain sufficient factual matter . . . to state a claim
24 to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678
25 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).
26 "A claim has facial plausibility when the plaintiff pleads factual
27 content that allows the court to draw the reasonable inference that
28 the defendant is liable for the misconduct alleged." *Id.* A

1 pleading is insufficient if it offers only labels and conclusions,
2 a formulaic recitation of the elements of a cause of action, or
3 "naked assertions devoid of further factual enhancement." *Id.*
4 (internal punctuation omitted).

5 Under Rule 9(b), "a party must state with particularity the
6 circumstances constituting fraud. . . . Malice, intent, knowledge,
7 and other conditions of a person's mind may be alleged generally."
8 Fed. R. Civ. P. 9(b). To comply with the rule, the complaint must
9 state with particularity the circumstances constituting the fraud,
10 including an account of the "time, place, and specific content of
11 the false representations as well as the identities of the parties
12 to the misrepresentation." *Edwards v. Marin Park, Inc.*, 356 F.3d
13 1058, 1066 (9th Cir. 2004). "[A]llegations of fraud must be
14 'specific enough to give defendants notice of the particular
15 misconduct which is alleged to constitute the fraud charged so that
16 they can defend against the charge and not just deny that they have
17 done anything wrong.'" *Bly-Magee v. California*, 236 F.3d 1014,
18 1019 (9th Cir. 2001) (internal punctuation omitted). Rule 9(b) is
19 satisfied if the plaintiff pleads "(i) some of the specific
20 customers defrauded, (ii) the type of conduct at issue, (iii) the
21 general time frame in which the conduct occurred, and (iv) why the
22 conduct was fraudulent." *United States v. Smithkline Beecham*
23 *Clinical Labs.*, 245 F.3d 1048, 1051 (9th Cir. 2001).

24 The motion to dismiss Count XII of the Fourth Amended
25 Complaint on the basis that the claim is barred by the statute of
26 limitations and/or extinguished by the statute of repose is denied
27 without prejudice to renew as a motion for summary judgment at the
28 close of discovery.

1 With respect to the pleading argument, Nevada provides for a
2 claim of actual fraudulent transfer as well as a claim of
3 constructive fraudulent transfer. See Nev. Rev. Stat. §
4 112.180(1)(a) (actual fraudulent transfer); *id.* § 112.180(1)(b)
5 (constructive fraudulent transfer); *Herup v. First Boston Fin.,*
6 *LLC*, 162 P.3d 870, 873 (Nev. 2007). The weight of authority is
7 that Rule 9 applies to claims of actual fraudulent transfer but not
8 to claims of constructive fraudulent transfer. See *In re Tronox*
9 *Inc.*, 429 B.R. 73, 96 (Bankr. S.D.N.Y. 2010) (collecting cases
10 concluding Rule 9(b) does not apply to claims of constructive
11 fraudulent conveyance); *In re Air Cargo, Inc.*, 401 B.R. 178, 192
12 (Bankr. D. Md. 2008) (noting that while courts are divided on the
13 question whether Rule 9(b) applies to constructive fraudulent
14 conveyance claims, the majority have concluded it does not);
15 *Van-Am. Ins. Co. v. Schiappa, et al.*, 191 F.R.D. 537, 542-43 (S.D.
16 Ohio 2000) (applying Rule 9(b) to claims of actual fraudulent
17 transfer but not to claims of constructive fraudulent transfer;
18 *Kelleher v. Kelleher*, 2014 WL 94197, at *6 (N.D. Cal. 2014);
19 *Hyosung (Am.), Inc. v. Hantle USA, Inc.*, 2011 WL 835781, at *4
20 (N.D. Cal. March 4, 2011); *Sunnyside Dev. Co. LLC v. Cambridge*
21 *Display Tech. Ltd.*, 2008 WL 4450328, at *9 (N.D. Cal. 2008). The
22 court agrees with the reasoning of these courts and concludes that
23 Rule 9 applies to a claim of actual fraudulent transfer under
24 Nevada law but not to a claim of constructive fraudulent transfer.

25 Liberally construing the complaint, plaintiffs have alleged
26 both claims here. Specifically, the complaint alleges that the
27 transfers were made with the actual intent to defraud, which is an
28 element of an actual fraudulent transfer claim. See §

1 112.180(1)(a); Fourth Am. Compl. ¶ 159). The complaint also
2 alleges that the transfers were made "[w]ithout receiving a
3 reasonably equivalent value in exchange for the transfer or
4 obligation" at a time that MRI believed or reasonably should have
5 believed that it would not be able to repay its investors, which
6 are elements of a constructive fraudulent transfer claim. See §
7 112.180(1)(b); Fourth Am. Compl. ¶¶ 154, 157). Therefore, the
8 court concludes that plaintiffs' actual fraudulent transfer claim
9 is subject to Rule 9(b) and thus must be pled with the requisite
10 particularity. Because that claim lacks detail as to the
11 particular fraudulent transfers - specifically the dates, amounts
12 and specific recipient of each allegedly fraudulent transfer -
13 plaintiffs' claim of actual fraudulent transfer is insufficiently
14 pled.

15 Accordingly, the Suzukis' motion to dismiss, joined by
16 Sterling Escrow, is **GRANTED** in part as to plaintiffs' claim of
17 actual fraudulent transfer. It is **DENIED** in all other respects.
18 Should plaintiffs wish to pursue a claim of actual fraudulent
19 transfer, they shall have to and including May 26, 2015, in which
20 to amend their complaint to properly state a claim of actual
21 fraudulent transfer as required by Federal Rule of Civil Procedure
22 9(b).

23 **IT IS SO ORDERED.**

24 DATED: This 10th day of April, 2015.

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26 UNITED STATES DISTRICT JUDGE
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